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Next Level Ventures, LLC, and
Advanced Vapor Devices LLC*

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**SHENZHEN SMOORE
TECHNOLOGY CO., LTD.,**

Plaintiff,

vs.

**NEXT LEVEL VENTURES, LLC,
and ADVANCED VAPOR DEVICES
LLC**

Defendants.

)
) No. 2:22-cv-07646-AB-AGR
)
) **DEFENDANTS NLV'S NOTICE**
) **OF UNOPPOSED MOTION AND**
) **UNOPPOSED MOTION TO STAY**
)
) Hearing Date: Dec. 16, 2022
) Hearing Time: 10:00 a.m.
)
) Hon. André Birotte Jr.
)

NOTICE OF MOTION

PLEASE TAKE NOTICE that the following Motion to Stay is scheduled for hearing before the Honorable André Birotte Jr., on December 16, 2022, or as soon thereafter as is convenient for the Court, in Courtroom 7B, of the United States District Court for the Central District of California, located at 350 West 1st Street, Los Angeles, CA, 90012.

Defendants Next Level Ventures, LLC, and Advanced Vapor Devices LLC (collectively, “NLV”) hereby move this Court for an order staying this case in its entirety until the conclusion of U.S. International Trade Commission Investigation No. 337-TA-1286, *In the Matter of Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same*, NLV’s Unopposed Motion to Stay is based on this Notice, the supporting memorandum of points and authorities below, the materials attached hereto, the record in this matter, and other evidence or argument that may be presented before the Court in connection with this Motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on November 7, 2022. Counsel for Shenzhen Smoore Technology Co., Ltd., (“Smoore”) has indicated that it does not oppose the Motion.

Dated: November 17, 2022

Respectfully Submitted,

DENTONS US LLP

/s/Nicholas H. Jackson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Next Level Ventures, LLC, and Advanced Vapor Devices LLC (collectively, “NLV”) request that this Court stay this case under 28 U.S.C. § 1659 and the Court’s discretionary authority until the conclusion of co-pending U.S. International Trade Commission Investigation No. 337-1286.¹ This motion is unopposed.

Plaintiff Shenzhen Smoore Technology Co., Ltd. (“Smoore”) filed this patent infringement action on October 19, 2022 against NLV. ITC Investigation No. 337-1286 (“The Investigation”) is also currently pending between Smoore and NLV, among other respondents. The Investigation was instituted on November 4, 2021, *Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing Same*, Inv. No. 337-1286, Notice of Institution (U.S.I.T.C. Nov. 4, 2021) (Ex. A), with a final decision due from the ITC on May 25, 2023. *Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing Same*, Inv. No. 337-1286, Order No. 41 (U.S.I.T.C. Nov. 2, 2022) (Ex. B). In The Investigation, Smoore alleges that NLV infringes three utility patents, including two of the five patents at issue here. Ex. A at 1.

Given the mandatory stay provisions under 28 U.S.C. § 1659, this Court must stay Smoore’s infringement claims with respect to the two patents asserted by Smoore

¹ By requesting this motion, NLV expressly reserves all defenses available to it including, but not limited to, challenges to venue, personal jurisdiction, invalidity, and infringement. *See Ariz. Yage Assembly v. Barr*, 2020 U.S. Dist. LEXIS 172836, at *44-45 (N.D. Cal. Sept. 21, 2020) (noting that a motion to stay is not a motion contemplated by Rule 12, and thus does not waive an objection to venue).

1 in the Investigation: U.S. Patent Nos. 10,791,762 (“’762 Patent”) and 10,791,763 (“’763
2 Patent”) (collectively, “the Overlapping Patents”). 28 U.S.C. § 1659(a). This Court
3 should also stay this Case under its discretionary authority as to the non-overlapping
4 patents: U.S. Patent Nos. D817,544 (“D544 Patent”), D823,534 (“D534 Patent”), and
5 D853,635 (“D635 Patent”) (collectively, “Non-Overlapping Patents”). *See Aliphcom v.*
6 *Fitbit, Inc.*, 154 F. Supp. 3d 933, 937 (N.D. Cal. 2015) (noting that “even where . . . the
7 district court and ITC actions do not involve precisely the same patents and same issues,
8 Congress explicitly intended that district courts should consider using their
9 discretionary power to stay patent infringement litigation that is related to, but not
10 duplicative of, an action before the ITC.” (internal quotations omitted)).

11 Furthermore, Smoore does not oppose the requested stay. Accordingly, a stay of
12 this case in its entirety should be granted because: (1) Smoore will not suffer irreparable
13 harm because Smoore is not entitled to injunctive relief for the Non-Overlapping
14 Patents; (2) a stay will minimize the hardship on NLV and Smoore of litigating two
15 cases in parallel; and (3) a stay will promote judicial efficiencies because The
16 Investigation may simplify the issues in this case and preserve judicial and party
17 resources.

18 II. BACKGROUND

19 On October 19, 2022, Smoore filed this suit against NLV, alleging infringement
20 of five patents. ECF No. 1 at ¶1. Smoore previously sued NLV in the ITC on October
21

1 4, 2021, asserting the two utility patents asserted in this case,² and filed a Statement on
2 Public Interest with its October 4 Complaint, in which it also discussed infringement of
3 the design patents that are asserted in this litigation: the D544 Patent, D534 Patent, and
4 D635 Patent. Ex. C at 6.

5 On November 4, 2021, the ITC instituted an investigation based on Smoore's
6 Complaint. Ex. A. After thorough discovery, the ITC held an evidentiary hearing on
7 August 1-5, 2022. Ex. D at 3. The Final Initial Determination from the ITC
8 Administrative Law Judge is scheduled to be issued on January 25, 2023, with the final
9 ITC decision due on May 25, 2023. Ex. B (Order No. 41).

10 With respect to this pending district court action, discovery has not yet begun.
11 Neither party has served discovery requests or produced documents, and the initial case
12 management conference has not been held. As a scheduling order has not yet issued, no
13 deadlines have been set for claim construction, the close of fact and expert discovery,
14 pretrial and dispositive motions, or trial.

15 **A. The Patents-at-Issue**

16 In this case, Smoore asserts infringement of five patents: the '762 Patent, the '763
17 Patent, the D544 Patent, the D534 Patent, and the D635 Patent. ECF No. 1 at ¶1. Before
18 the ITC, Smoore asserts infringement against two of those patents: the '762 Patent
19 and '763 Patent, a third Patent (U.S. Patent No. 10,357,623), and a registered
20 Trademark (U.S. Federal Trademark Registration No. 5,633,060). Ex. C at ¶¶70-92; Ex.

21 _____
² Smoore also refers to NLV as "AVD" in its Complaints.

1 E at ¶¶70-92. In The Investigation, Smoore also made a broad assertion of infringement
 2 for the D544 Patent, D534 Patent, and D635 Patent in its Statement on Public Interest.
 3 Ex. C at 6.

4 Apart from the Overlapping Patents, the patents asserted here and in The
 5 Investigation are related. All patents are directed towards the design and structure of
 6 electronic cigarettes and their atomizing assemblies. *See, e.g., id.* at ¶¶69-72; Ex. E at
 7 ¶¶69-72; ECF No. 1 at ¶¶9-20. There is common inventorship among the Overlapping
 8 Patents and the Non-Overlapping Patents. Ex. F; ECF No. 1-1 at 37, 54, 63, and 72.
 9 Further, in both this case and at the ITC, Smoore accuses the same NLV products of
 10 infringing all Overlapping and Non-Overlapping Patents. Ex. G; ECF No. 1 at ¶21.

11 **III. LEGAL STANDARDS AND ARGUMENT**

12 **A. A Stay of Smoore's Claims on the Overlapping Patents is Mandatory**

13 28 U.S.C. § 1659(a) sets forth the mandatory stay provisions that apply when a
 14 district court case and an ITC investigation proceed in parallel:

15 In a civil action involving parties that are also parties to a
 16 proceeding before the United States International Trade
 17 Commission under section 337 of the Tariff Act of 1930, at
 18 the request of a party to the civil action that is also a
 19 respondent in the proceeding before the Commission, the
 20 district court shall stay, until the determination of the
 21 Commission becomes final, proceedings in the civil action

1 with respect to any claim that involves the same issues
2 involved in the proceeding before the Commission, but only
3 if such request is made within—

4 (1) 30 days after the party is named as a respondent in the
5 proceeding before the Commission, or

6 (2) *30 days after the district court action is filed,*
7 *whichever is later.*

8 (emphasis added); *see Avago Techs. U.S. Inc. v. IPtronics, Inc.*, No. 5:10-cv-02863-
9 EJD, 2013 WL 623042, at *2 (N.D. Cal. Feb. 15, 2013) (granting mandatory stay as to
10 patent asserted in parallel district court and ITC cases); *Verve, LLC v. Verifone, Inc.*,
11 No. C04-03659JF, 2004 WL 2600452, at *1 (N.D. Cal. Nov. 15, 2004) (granting stay
12 of patent infringement suit in district court pending resolution of related ITC case). “The
13 purpose of § 1659(a) [is] to prevent infringement proceedings from occurring ‘in two
14 forums at the same time.’” *In re Princo Corp.*, 486 F.3d 1365, 1368 (Fed. Cir. 2007)
15 (citation omitted).

16 NLV is entitled to a mandatory stay of Smoore’s infringement claims based on
17 the overlapping patents because NLV is a named respondent in The investigation, and
18 timely filed this motion within thirty days of this action being filed. Smoore asserts the
19 same infringement claims with respect to the Overlapping Patents both here and at the
20 ITC. Therefore, this litigation involves the same issues as The Investigation: invalidity
21 and alleged infringement of the Overlapping Patents. Under 28 U.S.C. § 1659(a), the

1 Court must therefore stay this case as to the Overlapping Patents: the '762 Patent
2 and '763 Patent.

3 **B. This Court Should Exercise Its Discretion to Stay Smoore's Claims**
4 **on the Non-Overlapping Patents**

5 District courts have inherent authority to manage their dockets, including the
6 discretion to stay proceedings before them. *Avago*, 2013 WL 623042, at *2. "The power
7 to stay proceedings is incidental to the power inherent in every court to control the
8 disposition of the causes on its docket with economy of time and effort for itself, for
9 counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In deciding
10 whether to exercise discretionary power, courts consider three factors: (1) "the possible
11 damage which may result from the granting of a stay;" (2) "the hardship or inequity
12 which a party may suffer in being required to go forward;" and (3) "the orderly course
13 of justice measured in terms of the simplifying or complicating of issues, proof, and
14 questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*,
15 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). Courts in this
16 district have exercised their discretionary power to "stay patent infringement litigation
17 that is related to, but not duplicative of, an action before the ITC." *Avago*, 2013 WL
18 623042, at *2 (citing *Zenith Elecs. LLC v. Sony Corp.*, No. C 11-02439-WHA, 2011
19 WL 2982377, at *2 (N.D. Cal. July 22, 2011)). Here, these three factors weigh in favor
20 of staying this case as to the Non-Overlapping Patents.

1 **1. Smooore Would Not Suffer Any Harm From a Stay**

2 The clearest evidence of lack of harm to Smooore by this stay is Smooore’s stated
 3 non-opposition to the requested stay. Beyond Smooore’s non-opposition to this stay, no
 4 harm would result from a stay because Smooore’s recovery on the non-overlapping
 5 patents, if any, should be limited to monetary damages. A delay in the recovery of
 6 monetary damages does not justify denying a stay. *FormFactor, Inc. v. Micronics Japan*
 7 *Co., Ltd.*, No. cv-06-07159 JSW, 2008 WL 361128, at *2 (N.D. Cal. Feb. 11, 2008)
 8 (citing *CMAX*, 300 F.2d at 268-69); see *Sorensen ex rel. Sorensen Research & Dev.*
 9 *Trust v. Black & Decker Corp.*, No. 06CV1572 BTM (CAB), 2007 WL 2696590, at *4
 10 (S.D. Cal. Sept. 10, 2007) (granting a stay and explaining that “[t]he general prejudice
 11 of having to wait for resolution is not a persuasive reason to deny the motion for stay”
 12 where Plaintiff’s claims were “restricted to past monetary damages, which, with the
 13 addition of prejudgment interest, are fully capable of compensating Plaintiff”).

14 **a. Smooore’s Delay Shows It Is Not Being Irreparably**
 15 **Harmed**

16 As to irreparable harm, Smooore fails to show any by its 13-month delay in
 17 asserting any of the Non-Overlapping Patents against NLV. Even though Smooore could
 18 have brought suit against NLV for the design patents at least as early as November 2021,
 19 when the Non-Overlapping Patents were identified in Smooore’s Statement on the Public
 20 Interest presented to the ITC, (Ex. C at 6) Smooore did not assert these patents against
 21 NLV until October of 2022. “The most obvious indication that Plaintiff does not face

1 imminent, irreparable harm is its delay Courts routinely cite delay as evidence
 2 cutting against the imminence of the harm faced by the movant.” *QC Mfg., Inc. v.*
 3 *Solatube Int’l, Inc.*, No. SACV202208CJCJDEX, 2021 WL 4963380, at *3 (C.D. Cal.
 4 Sept. 10, 2021) (denying preliminary injunction, finding patentee failed to show
 5 irreparable harm where it delayed for eight months in seeking the injunction, and the
 6 accused infringer showed a substantial question of invalidity); *see also Oakland Trib.,*
 7 *Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay
 8 before seeking a preliminary injunction implies a lack of urgency and irreparable
 9 harm.”).

10 **b. *NLV’s Business Cannot Cause Smoore Irreparable Harm***

11 Smoore and NLV do not compete in a two-competitor market. *See, e.g.,* Ex. C at
 12 11-14 (naming 38 respondents in the co-pending ITC investigation brought by Smoore).
 13 Indeed, Smoore sued 38 companies in The Investigation, (*id.*), which provides a reliable
 14 indication of market size and participants. The likelihood of irreparable harm is low in
 15 such a crowded market. *See Open Text, S.A. v. Box, Inc.*, 36 F. Supp. 3d 885, 906 (N.D.
 16 Cal. 2014) (noting on a preliminary injunction motion, that “the potential harm...is
 17 probably at its greatest” in “a market where only two parties are directly competing”).

18 The mere fact that Smoore and NLV may be competitors within the oil-vaping
 19 cartridge sales market cannot show that Smoore suffers irreparable harm as a result of
 20 NLV’s business. The Federal Circuit has repeatedly held that competition is insufficient
 21 to show irreparable harm, and this conclusion is applicable here. *Apple, Inc. v. Samsung*

1 *Elecs. Co.*, 678 F.3d 1314, 1324-25 (Fed. Cir. 2012) (affirming in relevant part denial
2 of preliminary injunction and noting that a showing that the patentee “might lose some
3 insubstantial market share as a result of [the defendant’s] infringement is not enough”);
4 *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990) (rejecting
5 argument that “potential lost sales” alone always demonstrates “manifest irreparable
6 harm”) (internal quotations omitted).

7 **2. Denial of a Stay for the Non-Overlapping Patents Will Subject**
8 **NLV to Hardship, Forcing it to Unnecessarily Undergo**
9 **Duplicative Litigation Efforts**

10 Because the overlapping and non-overlapping patents are directed to the same
11 technology, share named inventors, and are asserted against the same NLV products,
12 staying this case as to all Asserted Patents would reduce unnecessary and duplicative
13 discovery. To do otherwise would result in additional burden on NLV. The court in
14 *Arris Enterprises* found the same to be true in a case where the patentee sued the
15 defendant in district court on the same patents and accused products in a parallel ITC
16 investigation, in addition to another patent not asserted in the ITC. *Arris Enterprises*
17 *LLC v. Sony Corp.*, No. 17-CV-02669-BLF, 2017 WL 3283937, at *2-4 (N.D. Cal. Aug.
18 1, 2017). In conjunction with the § 1659 stay, the court also granted a discretionary stay
19 as to the additional patent not asserted in the ITC, finding that “[f]orcing the parties to
20 litigate the non-overlapping patent in the present case would create additional discovery
21

1 that goes beyond the mere effort of defending a lawsuit, and would prejudice
2 [defendants].” *Id.* at *3.

3 Allowing this case to continue on the Non-Overlapping Patents would result in
4 essentially two separate actions with overlapping and duplicative discovery. For
5 example, all Non-Overlapping Patents and one of the Overlapping Patents (’763 Patent)
6 share a common inventor. Proceeding in this action on the non-overlapping patents
7 would mean that the common inventor could be deposed twice in this district court case.

8 Courts faced with similar situations have found the potential for duplicative
9 discovery to weigh in favor of a stay, because of the resulting hardships that come with
10 it: “[w]ithout a stay, the parties would have to conduct multiple depositions of the same
11 witness because of the inventors’ ability to speak only to the non-overlapping patents
12 while the overlapping patents are stayed.” *FormFactor*, 2008 WL 361128, *2; *see also*
13 *Arris Enterprises LLC*, 2017 WL 3283937 at *3 (“[o]ne example of potential
14 overlapping discovery is the depositions of witnesses who are knowledgeable on the
15 accused products and at least one overlapping inventor between the non-overlapping
16 patent and those asserted in the ITC. Without a stay, the parties would have to conduct
17 multiple depositions of the same witnesses because of their ability to speak only to the
18 non-overlapping patent while the overlapping patents are stayed.”); *Arris Sols., Inc. v.*
19 *Sony Interactive Ent. LLC*, No. 5:17-CV-01098-EJD, 2017 WL 4536415, at *2 (N.D.
20 Cal. Oct. 10, 2017) (finding the second *Landis* factor in favor of a stay because of the
21 “strong potential for duplicative discovery given the overlapping technology covered

1 by the patents-in-suit, as well as the fact that witnesses common to both actions, such
2 as inventors, would need to be deposed twice.”).

3 In *FormFactor*, the court found that where the patented technologies and accused
4 products were “similar” across parallel ITC and district court proceedings, there was a
5 risk of duplicative litigation efforts that weighed in favor of a stay. *FormFactor*, 2008
6 WL 361128, at *2 (“The Court finds there will also be significant overlap in discovery
7 because of the similar technology and products asserted in the patents in both the ITC
8 proceeding and the present proceeding.”); see also *Arris Enterprises*, 2017 WL
9 3283937 at *3 (“There will also be significant overlap in discovery in other respects
10 because of the similar technology and products asserted in both the ITC proceeding and
11 the instant action.”).

12 The same is true here. As explained previously, the technology covered by the
13 non-overlapping patents in this litigation is related to the technology addressed in The
14 Investigation. Both proceedings are litigating electronic vaping devices and their
15 atomizing assemblies. Furthermore, the accused products in this litigation and The
16 Investigation are also identical. Ex. G; ECF No. 1 at ¶21. Given the same technologies
17 and products are at issue, conducting both litigations in parallel is likely to result in a
18 duplication of litigation efforts including discovery, and, thus, lead to hardship on NLV.
19 See *Arris Enterprises*, 2017 WL 3283937 at *3 (“recognizing the potential burden for
20 both parties stemming for [sic] duplicative efforts, the Court finds that the potential
21 hardship from denying the stay weighs in favor of granting it.”).

1 Accordingly, this factor—imposing hardship on NLV—weighs in favor of
2 staying the entire case.

3 **3. A Stay Will Promote Judicial Efficiency and Simplify the**
4 **Issues in This Case**

5 A stay will promote judicial economy by conserving the Court’s and the parties’
6 resources, and simplifying the issues in this case. Allowing the case on the Non-
7 Overlapping Patents to proceed while the case on the Overlapping Patents is stayed will
8 result in two separate actions, each with its own separate schedule containing different
9 deadlines for discovery, expert reports, a *Markman* hearing, and trial. When faced with
10 overlapping and non-overlapping patents running on two separate tracks, the court in
11 *Avago*, found that judicial economy weighed in favor of a stay because “[a] dual
12 schedule . . . may require duplicative discovery, two rounds of expert reports, two
13 rounds of dispositive motions, and ultimately, two trials.” *Avago*, 2013 WL 623042, at
14 *3.

15 The same was true in *FormFactor*, where the court stayed the entire case and
16 noted that the case would be simplified because the overlapping and non-overlapping
17 patents covered the same technology and subject matter. There, the court explained “the
18 ITC’s interpretation of the overlapping patents and the additional patents before it could
19 inform this Court about the claims relating to the non-overlapping patents and also
20 narrow the issues in this matter.” *FormFactor*, 2008 WL 361128, at *3.

1 Similarly, in *Arris Enterprises*, the court found that “the third factor weighs
2 strongly in favor of granting the stay”, where “the ITC Action and this case still share
3 many similarities and involve the same accused products.” *Arris Enterprises*, 2017 WL
4 3283937, at *4. The court further opined, “having this case proceed on two different
5 schedules also does not serve the interest of judicial economy. Moreover, the impact on
6 this Court would be significant—absent a stay, the Court would be compelled to
7 empanel two juries and conduct pretrial proceedings in separate sequence.” *Id.* The
8 same rationale also applies here.

9 The similarities among the patents asserted here and at the ITC suggest the
10 resolution of The Investigation will simplify the issues in this case. Identical subject
11 matter and technologies are covered among the Overlapping and Non-Overlapping
12 Patents; the common inventorship among the Overlapping and Non-Overlapping
13 Patents; and the same NLV products accused of infringement suggest the Court will
14 benefit from The Investigation. Faced with a similar situation, the court in *Arris Sols.*
15 reached the same conclusion:

16 The prospect of proceeding on half of this case now while
17 the other half is abated is not one any court would deem
18 efficient, or one any party to litigation should embrace. One
19 patent infringement case is complex enough, but creating
20 two cases out of one, each with separate discovery deadlines,
21 claim construction hearings, dispositive motions, and trials,

1 is unnecessarily burdensome and an unwise allocation of
2 judicial resources. Moreover, the substantial similarities
3 between the patents means the proceedings before the ITC
4 will undoubtedly and valuably inform the parties and the
5 court once they conclude. This factor, therefore, weighs
6 strongly in favor of a stay.

7 *Arris Sols.*, 2017 WL 4536415, at *2.

8 For the same reasons, this Court should find that the third *Landis* factor weighs
9 in favor of staying the entire case.

10 **IV. CONCLUSION**

11 In view of the mandatory stay of Smoore's infringement claims on the '762
12 and '763 Patents, a discretionary stay is warranted as to Smoore's infringement claims
13 on the D544, D534, and D635 Patents. Staying the proceedings will (1) not harm
14 Smoore, (2) minimize any hardship on NLV, and (3) preserve judicial economy. Further,
15 Smoore does not oppose the requested stay. For these reasons, NLV respectfully
16 requests that the Court stay this entire case until the conclusion of The Investigation.

17 Dated: November 17, 2022

DENTONS US LLP

18 By: /s/Nicholas H. Jackson

Nicholas H. Jackson

19 Bety Javidzad

20 *Counsel for Defendants*

Next Level Ventures, LLC, and

21 *Advanced Vapor Devices LLC*

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **DEFENDANTS NLV'S NOTICE OF UNOPPOSED MOTION AND UNOPPOSED MOTION TO STAY** was filed electronically, and pursuant to Civil L.R. 5-3.2, was served on all interested parties in this action (i.e., served to registered ECF recipients via ECF electronic service) on November 17, 2022.

/s/ Nicholas H. Jackson
Nicholas H. Jackson